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Walter B. Kennedy

William R. White, Jr.

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THE BERTRAND RUSSELL CASE AGAIN

The Bertrand Russell case is reviewed by Professor Walton H. Hamilton, writing in the YALE LAW JOURNAL under the title "Trial By Ordeal, New Style". Professor Kennedy considers some of the extra legal aspects of the stated paper and Mr. White deals with some legal questions raised by the writer.—EDITORIAL NOTE.

PORTRAIT OF A REALIST, NEW STYLE

WALTER B. KENNEDY†

I

THE particular inspiration for this bit of juristic portraiture is a current piece by Walton H. Hamilton, Southmayd Professor of Law, Yale Law School, who pulled down his Pollock and Maitland and came up, like little Jack Horner, with a very attractive and suggestive title—"Trial by Ordeal, New Style."¹ The occasion for the professor taking his pen in hand is to deliver an inflammatory criticism directed against Justice John E. McGeehan of the New York Supreme Court because of his revocation of the appointment of Bertrand Russell as Professor of Philosophy in the College of the City of New York.² Why the Yale Law Journal selected its Fiftieth Anniversary Issue to publish this jural gem along with the distinguished contributions of Chief Justice Hughes³ and Lord Chief Justice Caldecote of England⁴ must remain one of the unsolved mysteries of law review journalism. One explanation may be ventured. His paper is a perfect example of a type of juristic writing pointedly criticized by Chief Justice Hughes in his "Foreword":

"If some members of this 'fourth estate' of the law, conscious of their prestige

† Professor of Law, Fordham University, School of Law.

1. Hamilton, *Trial by Ordeal, New Style* (1941) 50 YALE L. J. 778. (Hereafter cited Hamilton).

The present paper directs attention once more to the unscientific and impractical program of "probing" judicial minds, advocated by our realist reformers in the law. The net result of this "mind-reading" has been not only unsatisfactory, but highly dangerous if their "findings" are to be acted upon by court or lawyer. Kennedy, *Psychologism in the Law* (1940) 29 GEO. L. J. 139.

Are we not about surfeited with visionary "dissecting" programs which would compel our judges to spend their lives in legal laboratories, answering questionnaires and being "examined" and "psychoanalyzed" to find out *why* and *how* they decided their cases (completely ignoring, of course, the face value of their judicial opinions)?

2. Matter of Kay v. Board of Higher Education of the City of New York, 173 Misc. 943, 18 N. Y. S. (2d) 821 (Sup. Ct. 1940).

3. Hughes, *Foreword* (1941) 50 YALE L. J. 737.

4. Caldecote, *Foreword* (1941) 50 YALE L. J. 739.

and influence, may seem at times to assume an attitude approaching arrogance, they are at once subject to counter-attack and a balance of sound criticism is attained, with advantage to all concerned."⁵

Embedded in the pages of this distinguished Law Journal, rededicated to "the highest standards of legal journalism"⁶ is a severe criticism of judicial conduct which abounds in unverified accusation and sweeping generalization—an intemperate critique directed not alone against Justice McGeehan, but, by implication, against his judicial associates in the Appellate Division and the Court of Appeals of New York who participated—without dissent—in the various stages of the so-called *Bertrand Russell* case.⁷ The Yale professor has gone all-out in his attack upon the good faith, honesty and competence of Justice McGeehan.

Unfortunately, heat rather than light marks the temper of Professor Hamilton's contribution. Signs indicate that the article was penned in haste and not allowed to cool before publication. But beneath the personal pyrotechnics of the writer, there is one aspect of his paper which serves an excellent purpose. It provides once more a timely and typical example of the excesses of Legal Realism in action: the almost complete abandonment of legal principles, the futility of judicial "mind-reading" and the failings of the functional approach and fact-finding as substitutes for traditional law. It is these broader aspects of "Trial by Ordeal, New Style" which will be considered in the present paper.

Herein we find a veteran scholar, dealing with debatable questions of law and procedure, who discloses no evidence of adequate or original legal research.⁸ He did not even complete the citations of the concluding stages of the Russell ouster litigation.⁹ Grounds exist for the belief

5. Hughes, *supra* note 4 at 737.

6. *Id.* at 738.

7. One of the favorite and favored processes of realist scholars is to "count judicial noses" in order to show dominant judicial trends. See, for example, Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 HARV. L. REV. 545; FRANK, *LAW AND THE MODERN MIND* (1930) 50. Accepting the approved "comptometer" method of registering judicial behavior, it seems that all the jurists who passed upon the Russell litigation were out of juristic step—except Professor Hamilton.

8. Only three out of a total of sixteen footnotes in the Hamilton paper are given over to original legal research of primary authorities. These three notes produced six cases, four of the six carrying the signal "see" or "*cf.*" as a warning that the cited cases were concededly not squarely in point. Yet Hamilton complains that Justice McGeehan's opinion resides "in no legal authority." Hamilton, at 779.

9. One of Hamilton's first contentions is that Russell was denied due process of law. Hamilton, at 778-779. He failed to mention the motion which was brought on behalf of Russell for the purpose of permitting him to become a party to the pending ouster

that he failed to read carefully the few scattering cases which he set down in his fragmentary footnotes.¹⁰ He was *that* anxious to rush to the defense of the multiplex morality and "naive honesty" of Bertrand Russell.

In retrospect, it seems that there is only *one* item in the Russell incident which really riled our realist; that was the result of the decision. Change that result, decide that the British moralist should be allowed to teach his moral code and philosophy to the students of the City College of New York and the pungent pen of Hamilton would have remained poised and inert in mid-air. Sad to state it: Hamilton does not argue points of law; he is peremptorily pronouncing judgment on the moral and ethical—even maternal¹¹—values of our civilization and finding them, *a la* Russell, difficult to defend or elusive to define. The Yale realist has brought into the law¹² a new technique, and a new style. One may add up the playful gambols of Jerome Frank in Freudian fields, the juristic opportunism and irrationalism of Thurman Arnold, the juvenile pranks of Professors Rodell¹³ and McDougal¹⁴ and it is

proceedings. Hamilton, at 778 note 1. *Kay v. Board of Higher Education*, 259 App. Div. 879, 20 N. Y. S. (2d) 1016 (1st Dep't 1940), *motion for leave to appeal denied* 284 N. Y. 10, 29 N. E. (2d) 657 (memo.) (1940).

10. See White, *infra* at 208.

11. "Mothers are an unstandardized lot; their urges run the spectrum of all the emotions. Their solicitude for their young presents a motley pattern; there is no unity in maternal beliefs as to which sort of words of teachers will incite immature youth to sin." Hamilton, at 781.

12. Professor Hamilton's early teaching was entirely limited to history and economics. *DIRECTORY OF TEACHERS IN ASSOCIATION OF AMERICAN LAW SCHOOLS* (1941) 85. He is known as an "institutional economist." The institutional economists are said to be in "revolt against the too austere and abstract formulations of the classical old masters." LERNER, *The Shadow World of Thurman Arnold*, *IDEAS AS WEAPONS* (1939) 211. This is probably a nice way of saying that institutional economists are quite liberal. But the "institutional economists" can gather scant comfort from the viewpoint of their colleague in his *Trial by Ordeal, New Style*. Herein the "institution" which earns the greatest praise from the author is the "classical old" common law.

13. *RODELL, WOE UNTO YOU, LAWYERS* (1939).

His *WOE UNTO YOU, LAWYERS* has been too hot even for realists to handle and so they have politely but generally ignored him. The "antis" have really been his friends, pointing out that Rodell with unerring logic has merely translated into his book the full sweep of realist cynicism, developed out of youthful contacts with his "godfathers" in the movement. Kennedy, *Psychologism in the Law* (1940) 29 *GEO. L. J.* 154-156.

14. McDougal, *Fuller v. The American Legal Realists: An Intervention* (1941) 50 *YALE L. J.* 827. Professor Myres S. McDougal is a Yale realist (New Style). Coming into the writing game after Rodell had said "bye-bye" to law, lawyers, judges and law schools, there really seemed to be nothing left for a coming realist to do but to retrace his steps (which, by the way, would be a novelty).

But McDougal has developed a new technique; it might be called the "question-and-

still arguable that "Trial by Ordeal, New Style" clearly merits the Realist Award for 1941!

II

There is an aroma of distinguished legal scholarship, sweet charity and kindly comment permeating the Hamilton horoscope which marks the detached scholar. One cannot refrain from repeating the touching tenderness which gleams through the professor's reference to the "learned judge" who is "completely off his beat",¹⁵ who doles out "very unlearned law"¹⁶ and who is guilty of "abuse of his judicial trust."¹⁷ Without so much as a single reference to legal text, statute or precedent, the "judicial analyst" accuses the court of "wayward logic",¹⁸ calling "nasty [*sic*] names",¹⁹ and invoking "the authority of holy writ, verified by Justice

answer approach", no doubt an offshoot of radio's "Information, Please" or "Take It or Leave It" programs. With the true humility of a scholar, Professor McDougal does not tell you; he asks first; and then answers his own questions. For example, he asks in the above article: "what have the 'ethical' philosophers ever produced?" *Id.* at 839 note 38. He answers, relying on the "expert testimony" of the functional philosopher Felix S. Cohen: "It would not be unfair to say that no avowed ethical philosopher in the last hundred years has made a single fundamental criticism of the established institutions of modern society." *Id.* at 836 note 28.

It must be conceded that Professor McDougal's last statement covers a lot of time and territory. As a matter of fact the statement is highly questionable and "unfair." See *Encyclical, The Condition of the Working Classes*, by Pope Leo XIII, May 15, 1891. This Encyclical contains a rather complete critique of modern society and industry and proposes social and economic reforms which are now being "discovered" by some of our "new style" realists. See also *Encyclical, After Forty Years*, Pope Pius XI, May 24, 1931.

15. Hamilton, at 783.

16. Hamilton, at 786.

17. Hamilton, at 786.

18. Hamilton, at 779.

19. Hamilton, at 779.

One of the humorous spots in Professor Hamilton's diatribe against Justice McGeehan is his criticism of the use of "nasty names" in the course of his judicial opinion. The professor should not get unduly excited about "nasty names" in a case which involves an analysis of the works of Bertrand Russell. After all, the opinion does not purport to deal with or to analyze the property rights of *Goldilocks v. The Three Bears*.

A comparison of Justice McGeehan's "findings of fact" and his formal opinion discloses that he used a minimum of "nasty names" in reaching his conclusion. "It is not necessary to detail here the filth which is contained in the [Russell's] books." *Matter of Kay v. Board of Higher Education of the City of New York*, 173 Misc. 943, 948, 18 N. Y. S. (2d) 821, 827 (Sup. Ct. 1940).

But apart from all this, one cannot clearly follow the "double standard" of moral values which appears in our judicial analyst's text. While he objects to the justice's necessary use of "nasty names" in dealing with the legal issues involved, he conveniently dismisses these same "nasty names" in his appraisal of the morality of Bertrand Russell. More than

McGeehan"²⁰ in order to make out a case against Bertrand Russell. Then Hamilton concludes with the reserved comment that "the judge rises to every error which opportunity presents."²¹ But it takes a niftier pen than Professor Hamilton can wield to hide his bias beneath a barrage of words, or to cover up a lack of legal or factual data by overworking his Thesaurus. One can hardly endure to watch the writhings of our reformed realist who is so sorely distressed by His Honor's alleged departure from the finest traditions of law and equity; who deplors the learned justice's failure to follow the doctrine of *stare decisis*; who pleads for the preservation of the classical "landmarks" of dear old common law; and who denounces the ruthless puncturing of the precious "principles" of our six-century old heritage of classical doctrine.²² Here

that, he applauds the latter's "uncompromising honesty" and suggests that: "Some of us might think that Bertrand Russell's frailty lies in a sheer incapacity to rise to hypocrisy; that, with a naive honesty he recites the inquisitive journeys of his mind while we, more sophisticated folk, erect our screens and say acceptable things." Hamilton, at 785.

The point about all this is that Hamilton of course can complain about "nasty names" or soften them by the designation of "inquisitive journeys." It is not for us to determine or appraise his personal viewpoint. But we insist that he cannot shift the rules of the game, the "mores" of the times, the "climate of opinion" and use different moral standards from page to page depending upon whether he is defining Justice McGeehan's morality or that of Dr. Russell.

A further example of the unfair judgment of Justice McGeehan by the Yale professor is found in the following statement: "While to the mind of Justice McGeehan *morality is exclusively a matter of sex*, the moral urge is unpurposive." Hamilton, at 781 note 9. (Italics supplied). This generalization regarding Justice McGeehan's "morality" is without any semblance of verification. Indeed it is suspected that here, as elsewhere, Hamilton has written without any attempt to conduct neutral research or to make any analysis of other opinions by the learned judge. Cf. McGeehan, J., in *Dry Dock Savings Institution v. Harriman Realty Corp.*, 150 Misc. 860, 270 N. Y. Supp. 428 (Sup. Ct. 1934). We suspect that the professor would rather like Justice McGeehan's attitude in the last cited case, particularly when he says: "Chancery does not now, any more than it ever did, need the fiat of the Legislature to allow it to prevent the rigid rules of law from working an injustice." *Id.* at 861, 430. See also *Obiter Dicta* (1936) 5 FORDHAM L. REV. 378.

20. Hamilton, at 783.

Hamilton's likes and dislikes are so fluctuating that it is sometimes difficult to follow him. One would gather the impression that he took exception to Justice McGeehan's quotation of Holy Writ and that his additional comment "verified by Justice McGeehan", was intended to be sarcasm. Yet we find that the Southmayd Professor begins one of his own papers with a beautiful reference to "the greatest of saints" who declared that "the spirit gives life and the letter kills." Hamilton, *The Living Law* (1937) 26 SURVEY GRAPHIC 632.

Apparently nothing that Justice McGeehan says, even though it be a quotation from the Holy Writ, wholly satisfies our severe critic of the New York Judiciary.

21. Hamilton, at 779.

22. Hamilton, at 779.

stands our rescued lover of "landmarks" and "principles" who turns his back on his fellow-realists and now shudders at the slightest jar to the stability of precedent.

III

Let us now compare the legal scholar who pleads for solidarity of law and permanency of legal authorities with the same professor in the days before the Russell litigation. What were the outstanding objectives of his legal philosophy in those long years back of 1940 when realism was young and realists were busily engaged in selling their wares to Bench and Bar?

Proof exists that Hamilton was never disturbed in the slightest degree by a successful end-run around a stubborn "principle"; no legal "landmark" was ever monumental enough to stay his progress to a desirable end.²³ If in the good old days before "B.R." came to town Hamilton was short on "law", he did not hesitate to make his own "law." He operated under a very delightful, though vague, formula: Try any one of many different paths to reach a desirable result. If one juristic road is blocked, back up, turn around and try another alley. If it proves to be a blind alley, return to your starting point and try again and again until "the court [is] lured down that way."²⁴

In the Before-Russell Era, Hamilton roundly scolded the "ritualists" who see "a case only in terms of a single rule of law."²⁵ How provincial such a view then appeared to be! Very helpful was Hamilton in solving the problem of the distraught lawyer who was faced with obstacles of precedents and suffered from the complex of *stare decisis*. With bold assurance he advised the attorney not to be afraid of "general propositions." There is always a proposition, or two, or more which can be

23. Hamilton, *Judicial Process* (1932) 8 *ENCYCLOPEDIA SOC. SCIENCES* 450.

"It is useless to inquire whether judges should or should not make law; the fact and the necessity are alike inescapable. The goodness or badness of judicial lawmaking lies in the skill with which members of the bench ply their trade." *Id.* at 454.

24. "And in the common law and in the statutes, in procedure and substantive law, in judge-made law and that of more accredited origin, there is quite a corpus upon which to draw. It is only the little man, whom no legal statement can turn into an astute lawyer or a great judge, whose mind grasps a case out of the ordinary in a formula. His more resourceful brethren will find, along the line where fact meets law, not one but a dozen separate questions. The result depends as much upon a persuasive choice of issues as upon the arguments advanced; if one road or another is blocked by previous decisions, there are others which may possibly stand ready or perhaps a new avenue of approach may be opened—and the court lured down that way." Hamilton, *The Living Law* (1937) 26 *SURVEY GRAPHIC* 632, 633.

25. *Id.* at 633.

prettied up and thrown into the courtroom and presto! one of these diverse doctrines may make some flash-impact upon the receptive judicial minds. This lowly formula picked up, polished in judicial chambers, wrapped in legal cellophane is handed down by the court as its very own.

Note clearly, Hamilton is not explaining or apologizing for the flexible formulas of judge-made law. Not at all. He is the champion who is vigorously defending the fluidity of law in the making; he is glorying in the fact that a judge can, and should, recognize that "the law, a creature of communal authorship, is remade by the folk."²⁶ Juristic jugglery *de luxe* had an able defender who pointed with pride to the inevitable freedom of judicial decisions, the easy overruling of precedents, and the recognition that communal life and the changing mores of the times were of greater importance than the puny precedents and principles of the past.²⁷ Today, he views with alarm all this "communal" effort of the New York "folk" to keep Bertrand Russell from the Great Hall of City College, and thereby to save him from the contaminations of political and philosophical controversies now swirling about this "private institution," supported by municipal monies.²⁸

IV

But it would be unfair to minimize the intellectual stature and professional prestige of Walton H. Hamilton or to imply that the Hamilton-Russell combination is another Boswell-Johnson alliance. True enough, Dr. Johnson and Dr. Russell both came out of Oxford but there the resemblance ends. Hamilton did not need a Russell to give him standing in American legal literature. Long before Dr. Russell was peddling his precious palliative of trial marriage along the book stalls, the Yale professor was already an outstanding figure in legal education, specializing in the study of the jurist's art, the probing of judicial minds, the delicate dissecting of the innermost secrets of the judiciary. He has psyched Blackstone,²⁹ psychoanalyzed Waite,³⁰ previewed Frankfurter,³¹ analyzed

26. *Id.* at 633.

27. Anyone familiar with the realist movement in America will observe that Hamilton was merely following along the main highway of legal realism; his viewpoint in a general way was typical of many other realists at Yale, Columbia and elsewhere.

28. One of the contentions made by commentators of the Kay decision is that the College of the City of New York is not a "public school" within the meaning of the Education Law of New York, Section 550. (Comment (1940) 53 HARV. L. REV. 1194. See White, *infra* note 22.

29. Hamilton, Book Review (1939) 39 COL. L. REV. 724.

30. Hamilton, Book Review (1938) 47 YALE L. J. 846.

31. Hamilton, *Preview of A Justice* (1939) 48 YALE L. J. 819.

Cardozo,³² Brandeis³³ and a train of other judicial personages.³⁴ And now out of the wealth of his experience our "judicial analyst" condescends to add Justice McGeehan, and the appellate justices who participated in the Russell case, to the Hamilton Hall of Fame. It is so touching a tribute that one may well excuse the humble justice of the New York Supreme Court for a momentary flash of pride in his elevation by our leading brain-pan bisector to Olympian heights along with Marshall, Holmes, Brandeis and Black.

But one must not embarrass Professor Hamilton by asking him how he has acquired and developed this uncanny skill of taking on any and all judges, "luring" them into his psychological laboratory, wheeling out his testing and probing apparatus and giving the judge his once-over, judicial I.Q. rating. It is still very mysterious even to the judicial sooth-sayer himself, who in an unguarded moment once broke down and let the secret out of his brief bag:

"As yet we know far too little of 'the hidden sources of preference' to understand why judges decide as they do. Their real reasons are locked within their own minds—or within judicial council chambers—even if they are known to themselves. Their good reasons—or at least the best they can command for the occasion—are displayed in the reports."³⁵

So you see, it is practically impossible to know the reasons which prompt a judge to reach an instant decision. Did this confession of helplessness prevent our mind-reader from continuing his unscientific and dogmatic explanations of judicial conduct? The answer is found in the "box score" of judges who have already been catalogued by our professorial phrenologist. It would seem to a confused onlooker, if Hamilton's own estimate of judicial reasoning is correct, that our experimentalists would have the humility to wait until science had caught up with their theories lest they be foisting some untried program upon the legal order. But if you think that our legal realists are willing to pause until the scientists in other disciplines endorse their "scientific" methods, you do not know your realists. Like it or not, cranial jurisprudence is here to stay regardless of its unscientific character and the utter futility of its studies of judicial minds to date. For the present, at least, we might as well prepare to endure this latest fad of legal realism, even though it possesses no utility or value in the legal order.

32. Hamilton, *Cardozo, The Craftsman* (1938) 6 U. OF CHI. L. REV. 1.

33. Hamilton, *The Jurist's Art* (1931) 31 COL. L. REV. 1072.

34. Hamilton, *The Living Law* (1937) 26 SURVEY GRAPHIC 632.

35. *Id.* at 632.

V

Better still, why not give some friendly advice to the cerebral jurists before concluding this tribute to judicial analysis? We might even turn about the candid camera, so often operated by our realist brethren, and attempt to picture a few of their own particular shortcomings. Certain it is that we can do no worse than they have done to date even though we confess to a complete lack of skill or technique in depicting the mental failings of our judges. One need not look far to discover the secret of the realist formula of judicial analysis. It is quite simple and safe: *Say anything you want regarding the hidden thoughts and prejudices, hunches and headaches of any judge, anywhere, any time; and defy anybody to prove that you are wrong!*³⁶ Not even the judge himself who is being psychoanalyzed can do so. If the jurist objects to the charges of bias or indigestion as primary causes of his judicial opinions, our realist-phrenologist will counter with the claim that judicial opinions are traceable to the subconscious, subvocal and subterranean motivations of the judge's inner, unknown and unknowable self!

36. A good realist-prober of the judiciary does not hesitate to turn back the yellowed pages of the reports one hundred years or more, pick up a pivotal opinion of a learned judge, and "read into it" his own enlightened views explaining why the judge decided the case in a particular way, minimizing generally the reasoned and documented judicial opinion.

For an extreme example of modern judicial psychologism in action, see Hamilton's analysis of Lord Abinger's opinion in *Priestly v. Fowler*, 3 M. & W. 1 (Ex. 1837). Hamilton, *The Living Law* (1931) 26 SURVEY GRAPHIC 632, 634. Cf. Dean Pound's case analysis of the alleged "background" of *Priestly v. Fowler* and his complete answer to the imaginary reasons which, our realists allege, prompted Lord Abinger's judgment. Pound, *The Economic Interpretation and the Law of Torts* (1940) 53 HARV. L. REV. 365, 373-377.

For a sample of "wholesale" judicial probing applied to judges of the present era, see Rodell, Book Review (1941) 41 COL. L. REV. 766. While this piece of judicial analysis started out as a "book review", it failed miserably to reach this objective. But it provided Professor Rodell of Yale Law School with an opportunity to catalog the exact judicial ratings of the five new justices of the Supreme Court whom Rodell, with his robust sense of humor, calls the "quintuplets" of the Roosevelt era. With hardly a rhetorical pause, Rodell quickly labels each one of the new justices. Perhaps erroneously, but *very* quickly.

His judicial "I.Q." rating runs something like this: (1) Justice Reed is denominated "an earthbound precisionist." (2) Justice Murphy is called a "humanitarian mystic." (3) Justice Douglas (former *Yale* law professor) is placed near the head of the class as a "judicial statesman." (4) Justice Frankfurter (former *Harvard* law professor) betrays "a debonair disregard of down-in-the-dirt substance—a spry and cocksure authoritarianism—that even the most elegant of language cannot quite conceal." Lastly, Justice Black receives top-billing because he displays "a brand of intellectual courage that the Court has not known since Holmes was in his heyday." *Id.* at 768-769.

"There it is," modestly concludes Rodell, "take it away." *Id.* at 769.

This emphasis upon cranial jurisprudence doubtless accounts in part for the dearth of Hamilton's legal research. Law, as old-fashioned lawyer or judge uses the term, is relegated to the corner in his workshop; one good judicial "probe" is better than a dozen decisions in point, but "nolawism" can be carried too far even when accompanied by a lovely literary style. As Cardozo expressed it: "Nothing can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past."³⁷ Another fatal defect of "Trial by Ordeal, New Style" is that it fails to contain adequate factual data. While a realist may struggle along without law, he is lost when he is away from his beloved facts. Professor Hamilton's paper discloses neither legal research nor adequate factual material. Without law and without facts to support his thesis, the tinsel of literary style alone, even when aided by his ambitious analysis of judicial minds, was unable to sustain the burden in "Trial by Ordeal, New Style."

PROFESSOR HAMILTON'S LAW

WILLIAM R. WHITE, JR.†

THE title "Southmayd Professor of Law" has an impressive euphony. With so formidable a designation appended to a writer's name, what ordinary mortal would hesitate to rely on the thoroughness of his legal scholarship? Nevertheless, in the recent article¹ on the *Bertrand Russell* case² by Professor Walton H. Hamilton, it is again demonstrated that imposing facades do not guarantee interiors free from defect. His undertaking was to show that Justice McGeehan committed "every error that opportunity presented"³ in rescinding the appointment of Bertrand Russell to the chair of philosophy in the College of the City of New York. His accomplishment has been to reveal serious deficiencies in his own research in four fields, law, philosophic ethics, psychology and logic, and arouse doubt whether his conclusions in a fifth, history, are entirely accurate.

Never seeming to suspect that his acquaintance with his subject is

37. CARDOZO, *GROWTH OF LAW* (1924) 60.

† Lecturer in Law, Fordham University, School of Law.

1. Hamilton, *Trial by Ordeal, New Style* (1941) 50 *YALE L. J.* 778.

2. The article criticizes only the opinion of Judge McGeehan in *Matter of Kay v. The Board of Higher Education*, 173 Misc. 943, 18 N. Y. S. (2d) 821 (1940).

3. Hamilton, *supra* note 1, at 779.

based on careless analysis, Dr. Hamilton fears that his essay "may seem to exhibit an overconcern with technical issues. . . ."⁴ It is implied that he has been thorough and technical, perhaps to a fault. At times, we are all guilty of such self-delusion as to the scientific perfection and methodology of our work but it is regrettable that Dr. Hamilton has made his sciolism the basis of an attack on the good faith of a respected judge. Perhaps, drawing his attention to some of the legal aspects, which his haste overlooked, will convince him that he has been unfair in assuming that Judge McGeehan acted capriciously and remind us that authors are not always authorities.⁵

I

Among his more obvious transgressions against careful scholarship is Dr. Hamilton's claim that the petitioner, Mrs. Kay, had no "legal interest" in the matter, as she was not aggrieved by the decision of the Board of Higher Education. It is assumed by Dr. Hamilton that Mrs. Kay was bringing the suit as a "taxpayer"⁶ (although he criticizes the court's opinion for its "vagueness" on the point). He argues that even as a taxpayer, Mrs. Kay had no recognizable "legal interest". A reading of the opinion clearly shows that the court understood the suit to be what it was intended to be, a proceeding under the New York Civil Practice Act, Article 78 and not a "taxpayers suit" under the General Municipal Law, Section 51. In the first line of its opinion the court denominates the proceeding as such. Therefore Dr. Hamilton's authorities involving taxpayer's suits, even if correctly used, would be beside the point. He should have referred us to cases showing that Mrs. Kay had no legal right to bring her suit under Article 78. The fact is that several decisions definitely show that Mrs. Kay did possess the necessary "legal interest" under that article. That part of the Civil Practice Act is intended to substitute for the old writs of mandamus, certiorari and prohibition.⁷ To bring a writ of mandamus to compel public officers to perform their duties, it was required *merely* that the petitioner be a "citizen" of the State of New York as Mrs. Kay was shown to be.⁸ In *Matter of Anderson v. Rice*⁹ a mandamus was sought, to compel the discontinuance of

4. Hamilton, *supra* note 1, at 786.

5. Several interesting questions could be raised about the ethical, psychological and logical connotations of the professor's views, but time does not permit.

6. Hamilton, *supra* note 1, at 779, 780.

7. N. Y. CIV. PRAC. ACT § 1283.

8. Allegation I of the petition alleged her citizenship.

9. 277 N. Y. 271, 14 N. E. (2d) 65 (1938).

the practice of appointing persons to the position of trooper in the state police without open competitive examination. Although the petitioner had not applied for a position on the force, the Court of Appeals emphasized his right *as a mere citizen* to seek the discontinuance of the unlawful practice. It said:

"The point has been raised that the petitioner here is not capable of presenting this matter to the court, as he has not applied for a position on the force. He is of age to make such application *but, more than that, he is a citizen and resident of the State of New York, and, being such, is capable of presenting to the courts his petition for the enforcement by officials of their mandatory duties.*"¹⁰

Such language by the Court of Appeals supports Justice McGeehan's position that plaintiff had a legally cognizable interest in the matter.¹¹ When the court spoke of "mandatory duties" it must have had in mind the duty to comply with legal requirements in the appointment of applicants to the civil service and to give examinations, because that was the very case before it.

Matter of Anderson v. Rice also indicates approval of the measure taken in voiding the appointment of Bertrand Russell to the Civil Service of the state. The court says:

"We grant the relief prayed for to the extent of holding that the Superintendent must discontinue this practice and hereafter make his appointments from lists prepared after a competitive examination.

"This decision does not affect or disturb the officers in the positions they are now holding, as time must be given to the Superintendent to carry out the purposes of the Civil Service Law, as we have expressed it, without disrupting and disorganizing his staff. At such time and under such rules and regulations as he may adopt pursuant to this Executive Law, he can and will provide for examinations, giving due regard to experience and service in his ratings. . . . Mandamus is an extraordinary remedy, and its issuance is to a great extent discretionary. The courts will be chary to issue it so as to cause disorder and confusion in public affairs, even though there may be a strict legal right. . . . Besides, we cannot tell from this record but that previous appointments may have been legally made, as the amendments to the Executive Law have in the process of time changed the facts and the law applicable thereto."¹²

10. *Id.* at 281. (Italics supplied.)

11. In *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 156 N. E. 663 (1927), a petitioner, not a resident or taxpayer of White Plains, sought a mandamus, merely as a citizen of the state, against the Commissioner of Education to compel him to cease excusing children from school in White Plains to attend religious instruction. The procedure of the case was approved in *Lewis v. Board of Education*, 258 N. Y. 118, 123, 179 N. E. 315, 317 (1932) although the petitioner was denied her order because no illegality was found.

12. 277 N. Y. 271, 282, 14 N. E. (2d) 65, 70 (1938).

The inference is clear that if a person is illegally appointed and his removal will not disrupt the staff involved, the applicant may be ordered removed. Bertrand Russell's appointment was to take effect in the future.¹³ It was not the kind of an appointment which could be voided only at the cost of disorganizing the teaching staff of the College of the City of New York. If it was illegally made, as Judge McGeehan claimed and Dr. Hamilton does not successfully refute his claim, the voiding of the appointment was proper.

Something must be said about *Massachusetts v. Mellon*,¹⁴ which Dr. Hamilton cites as support for his proposition that a taxpayer's suit could not be maintained by Mrs. Kay.¹⁵ Considering Dr. Hamilton's position, *Massachusetts v. Mellon* is not only no authority for his view, but on its face reveals an answer to his claims. Inspection discloses that it concerns an attempt by a single taxpayer to enjoin government officials from enforcing an Act of Congress whereby funds were to be disbursed to state agencies to reduce maternal and infant mortality. It is not a precedent for the situation in the *Russell* case where local funds are to be spent by a local board. Indeed the court says in the course of its opinion:¹⁶

"The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court."

In *Crampton v. Zabriskie*, taxpayers of Jersey City secured certiorari to review the action of a local board of freeholders in contracting to buy land. The Supreme Court affirmed the decree saying:¹⁷

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent . . . the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question."

Jean Kay's interest, if a taxpayer's interest is necessary, is close to that of a municipal taxpayer and the appointment of Russell at a stated

13. See Agenda of Administrative Committee, p. 9.

14. 262 U. S. 447 (1922).

15. There is some language in New York cases to the effect that a taxpayer's suit under GEN. MUNIC. LAW § 51 is not proper where mandamus is available. See *Lewis v. Board of Education*, 258 N. Y. 117, 123, 179 N. E. 315, 317 (1932). But this is not Professor Hamilton's argument.

16. *Massachusetts v. Mellon*, 262 U. S. 447, 486 (1922).

17. 101 U. S. 601, 609 (1879).

salary the creation of a debt, which if illegally assumed was subject to the interposition of equity.¹⁸ In the light of such authorities, we wonder if some modification is not indicated for the view that Mrs. Kay was a "person who can *scarcely* be accorded a legal interest in the matter."¹⁹

II

Another lethal dart aimed at the Russell opinion ridicules the claim that the English pedagogue, being an alien, could not be legally appointed to the staff of City College. Dr. Hamilton's treatment is not fully developed. It covers only a sentence²⁰ and a footnote of two and one-half lines in support,²¹ but he claims that Section 550 of the New York Education Law allows an exception to alien teachers who make due application and later duly qualify for citizenship.²² Judge McGeehan's thought

18. Cf. note 15 *supra*.

19. The professor's views seem to show an outdated and somewhat undemocratic political philosophy. The sound view is that the citizen has a duty to take an active interest in government and every reasonable step to secure able public servants.

20. Hamilton, *supra* note 1, at 784.

21. Hamilton, *supra* note 1, at 784, note 12.

22. It has been argued that the Education Law does not apply to the Board of Higher Education. Note, *The Bertrand Russell Case: The History of a Litigation* (1940) 53 HARV. L. REV. 1192. This, if true, is a fundamental difficulty but its validity is not entirely clear. The note writer claims "internal evidence" shows that Section 550 does not apply to colleges. It is said that Article 20 where the section appears does not mention "Boards of Higher Education" and that many of its provisions are inapplicable to college teachers. However, N. Y. EDUCATION LAW § 1142, provides for the establishment of a board of higher education which shall "govern and administer that part of the *public school system* . . . which is of collegiate grade. . . ." (Italics supplied.) This would make the College of the City of New York part of the public school system and included under Section 550 which applies to public schools. See also N. Y. EDUCATION LAW § 1143 providing that educational units conducted by the board are part of the "common school" system.

People *ex rel.* Hill v. Crissey, 45 Hun 19, 21 (N. Y. 1887), cited to support the contention of the note writer involved a statute providing scholarships at Cornell University for students from "public schools." The court held that because these scholars were to compete for scholarships for entrance into a college, the legislature must have intended the term "public school" in the particular statute before it to include only high schools and secondary schools. The case does not seem to require or permit extension of this definition of public school beyond the type of statute before the court.

Another case relied on, *Matter of Becker v. Eisner*, 277 N. Y. 143, 13 N. E. (2d) 747 (1938) held that an attempt by statute to make "all laws" applicable to the Board of Education also applicable to the Board of Higher Education violated Article III, Section 17, of the New York State Constitution. The statute was too vague. But the *Russell* case seems quite different. There is no effort in the *Russell* case to incorporate into the provisions of the law affecting the Board of Higher Education all the provisions of previous statutes, but only those relating to the "public schools system" of which colleges under the Board seem to be a part.

on this matter was that Bertrand Russell could not be admitted to citizenship. Hamilton's tart rejoinder (in the aforementioned footnote) takes the opposite viewpoint.

The judge and not the professor seems to have the stronger position here. The naturalization statute provides that no one may be admitted to citizenship unless he can show that for five years preceding his application he has been well disposed to America's institutions and form of government and a person of good moral character.²³ In *In re Saralief*,²⁴ the application of a person pledged to the principles of communism, was rejected because he could not be attached to our constitutional form of government or our institutions and it was pointed out that a strong and active support of American tradition is required of the alien. *United States v. Schneiderman* is to the same effect.²⁵ Not only has Bertrand Russell indicated his support of communism in his books,²⁶ but he has said of the Constitution that it is a "paralyzing influence."²⁷

Although the cases have not raised the point clearly, perhaps another reason for disqualifying Russell is atheism. He has claimed to be an atheist on the basis of arguments which a competent philosopher would reject.²⁸ Whether he is still such the writer does not know. If he is, it is in point to remember that traditional American political philosophy is based on a belief in God and God-given natural rights—as set forth in the Declaration of Independence. How any fair-minded person can say then that Bertrand Russell is attached to our institutions would present a problem for the Cumaean sibyl.

III

The professor moves forward in his assault, taking up the judge's contention that Bertrand Russell could not be legally appointed without being subject to examination by the Board of Education. By a queer kind of inconsistency the professor complains that the judge is formalistic (in demanding that Bertrand Russell submit to a testing of his qualifications) although he himself insists on formalism in judicial procedure. He does not seem to question the judge's law on the point²⁹ but is annoyed

23. 52 STAT. 1247, 8 U. S. C. A. § 382.

24. 59 F. (2d) 436 (E. D. Mo. 1932).

25. 33 F. Supp. 510 (D. C. Calif. 1940).

26. See Findings of Fact § 314 *et seq.* and RUSSELL, *BOLSHEVISM, ITS THEORY AND PRACTICE* 4. RUSSELL, *IN PRAISE OF IDLENESS* 140.

27. RUSSELL, *EDUCATION AND THE MODERN WORLD* 19.

28. In *WHY I AM NOT A CHRISTIAN*, at p. 10, Russell gives various grounds for being an atheist.

29. Hamilton, *supra*, note 1, at 784.

because the judge follows its illiberal mandate. However the remark is buttressed by reference to two student comments in law reviews.³⁰ Apart from the fact that Russell's competence on certain philosophic subjects is open to question, the professor knows that it is not for a special term judge to inquire into the wisdom of the Civil Service Law. The judge's position seems at least arguable when he says the law requires some kind of competitive examination where practical, or a non-competitive examination of a candidate's character and record in situations where that type is practical.³¹ Amendments to statutes are fashioned in the Halls of the Legislature, not on the Bench. As for the student notes cited by Professor Hamilton, they argue that competitive examinations are impractical in securing the services of college professors. One might question why? No difficulty is found in examining prospective high school teachers, or in securing principals of high schools, or in obtaining administrative officers of the public school system. If competitive examinations are not feasible, why is a non-competitive testing impractical? In the past the ordinary applicant for a position on the staff of the College of the City of New York has had his record of scholarship and achievement inspected. This time the petitioner alleges it was not done. Perhaps facts could be produced to explain or refute this claim but since they were not produced before the court, he had no alternative. Justice McGeehan's position that *no examination at all* had been made of Bertrand Russell's qualifications was a necessary legal conclusion from the papers before him.

The asserted fact that private institutions secure their teachers without competitive examinations is no indication that some type of analysis of the applicant's character and works is not given. Nor is it a demonstration that examinations are impractical. In large private business institutions, clerks may be taken on without examination and this is probably the general rule throughout the country. It is a *non-sequitur* to conclude that it is therefore impractical to secure clerks for the Civil Service by way of competitive or non-competitive examination.³²

IV

The professor pours out the vials of his wrath on the contention that

30. Note, *The Bertrand Russell Litigation* (1941) 8 U. OF CHI. L. REV. 316; Note, *The Bertrand Russell Case: The History of a Litigation* (1940) 53 HARV. L. REV. 1192.

31. N. Y. CONST., Art. V, § 6.

32. The same effort to avoid a strong argument by minimizing the space devoted to it is evident in Hamilton's offhand dismissal of the point that without a certificate from a normal school Bertrand Russell was not qualified to teach under the law. See Hamilton, *supra* note 1, at 784.

Bertrand Russell's moral character and principles make him unsuitable as an instructor and exemplar of plastic youth.³³ He asserts in effect that one person's principles do not "cause" another to do wrong and that the law does not recognize the "tendency" of one person's ideas to influence his neighbor's action. He is very positive in his view that the judge's argument lacks legal validity. Technical discussion of case-law is lacking however and no reference to the "established law" which is said to condemn the judge's position is given.³⁴ The whole spirit of the law in many fields contradicts the professor's assumption. The naturalization statute mentioned above, and the cases decided thereunder, exclude persons of pacifistic principles from the ranks of our citizenry on the theory that there is a "tendency" to follow the example and teaching of one's neighbor and pacifists may induce other citizens to refuse military service.³⁵ It is considered so unsuitable for a schoolman to be connected with immorality that he has been removed from his teaching office upon a mere indictment for adultery.³⁶ In the field of torts, where Professor Hamilton has lectured, is it not a slander to accuse a teacher of immorality?³⁷ Why, in the field of international law, does the Senate covenant with other powers that propaganda shall not be carried on in the United States?³⁸ The law recognizes, in the instances given that your neighbor's principles may eat away at your defensive barriers. A generation of students beclouded by the obscurantisms of a Russellian moral code will be unlikely to lead upright lives.

V

Turning from substantive law to Hamiltonian criticisms of Judge McGeehan's procedure, we find the teacher concerned with the Corporation Counsel's motion to dismiss the petition on the ground that it was in-

33. Hamilton, *supra* note 1, at 784-786.

34. Hamilton, *supra* note 1, at 786.

35. Thus, in *United States v. Schwimmer*, 279 U. S. 644 (1929) a woman lecturer, too old to bear arms, was excluded from citizenship for her pacifist leanings. The court said, at p. 652, that her testimony showed she was "disposed to exert her power to influence others to such opposition" to military service. And again, at p. 650, "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms . . . detracts from the strength and safety of the government." Apparently "tendency" has its place in the law.

36. *Freeman v. Town of Bourne*, 170 Mass. 289, 49 N. E. 435 (1898). See also *School District of Ft. Smith v. Maury*, 53 Ark. 471, 14 S. W. 669 (1890) and N. Y. EDUCATION LAW § 556.

37. *Thompson v. Bridge*, 209 Ky. 710, 237 S. W. 529 (1925).

38. *Treaty Between United States and The Union of Socialist Soviet Republics* (1935).

sufficient in law. Happenings in court on the return day of the petition when the motion was heard, are vigorously described by Professor Hamilton as an "abuse of judicial trust" and a blow at "academic freedom."³⁹ The discussion supporting these strictures is as usual negligible; one or two sentences being considered enough.

Let us note what actually happened in court and ask whether valid objection could be made, taking up step-by-step the course of the proceedings on the return day. On that day, the petitioner's attorneys were heard first, arguing for the sufficiency of the petition.⁴⁰ They asked the judge to consider another ground for their request, beside those already alleged, namely, the ground that the Board of Higher Education had acted illegally in failing to examine Bertrand Russell before appointing him. The addition of this ground might be considered a permissible amendment to the petition, because Section 1294 of the Civil Practice Act provides: "Either party may request the Court to correct any omissions or defects in the papers. . . ." At any rate the Corporation Counsel (through his assistant in charge) made no objection to the addition of the new ground because of surprise.

Thereafter, the argument of the Corporation Counsel was presented, his only claim being that the Board of Higher Education was permitted to appoint an alien as a teacher.⁴¹ No attack was directed against the other grounds of the petition.⁴² When the arguments were concluded, the judge informed the attorneys that he was reserving decision on the motion to dismiss. He had inquired of the Corporation Counsel whether he wished to put in any answer or contest the petition on its merits. According to Judge McGeehan the Assistant Corporation Counsel in charge,

39. Hamilton, *supra* note 1, at 786.

40. Minutes of hearing before Judge McGeehan.

41. See brief submitted by the Corporation Counsel in support of its motion and the opinion of McGeehan at p. 823.

42. The UNIVERSITY OF CHICAGO LAW REVIEW Note claims that the petition should have been dismissed because it did not allege that the claim had been presented to the Board of Higher Education for adjustment thirty days before filing the petition in court as required under New York Education Law, Section 1146. Note (1941) 8 U. OF CHI. L. REV. 316, 319. A reading of that Section seems to support a construction making it inapplicable to Mrs. Kay's petition. It refers to presenting a claim for "adjustment" and speaks of "the officer or body having the power to adjust or pay said claim," evidently referring to a fiscal officer or financial committee and providing that appeal be taken to the whole Board of education before it may be sued for the default of such financial agents.

A similar provision appeared in the old N. Y. CITY CHARTER § 261. Under this it was said that the section really referred to demands made against the financial officer of the city, the Comptroller. *Penfield v. City of New York*, 115 App. Div. 502, 505, 101 N. Y. Supp. 442, 443 (1st Dep't 1906).

indicated that the City would not answer the petition or contest it on its merits.⁴³ Professor Hamilton seems to complain of the judge's action in reserving decision on the motion. He says that "each round must be complete before the next is called."⁴⁴ Probably a misunderstanding of the nature of the proceeding explains his mistake. Section 1291 of the Civil Practice Act fixes the statutory time for filing an answer at two days before the return day. An answer may be permitted at a later date, however, in the discretion of the judge, where the respondent has moved to dismiss the complaint. It is under Section 1293 of the Civil Practice Act that the judge is empowered to permit such answer "in the event of the denial of such application [to dismiss the petition] . . . upon such terms as may be just."

Permission to file an answer is properly granted a respondent in the same order denying the motion to dismiss.⁴⁵ Since the question, whether it would be proper to permit an answer, would be raised simultaneously with the decision of the motion to dismiss the complaint, the judge rightfully inquired of the Corporation Counsel whether he desired to answer the petition. He could not sensibly add to his order a permission to answer unless he knew the Corporation Counsel's wish for it. Certainly no one can complain of the Court's fairness in informing the Corporation Counsel of his right to request an answer and in inquiring of him whether or not he intended to put in one when reserving his motion to dismiss. In the absence of a request for time to answer, the case would stand "at default", if the motion to dismiss should be denied. There had been an application, a motion to dismiss, reservation of the decision thereon and as far as the merits of the case were concerned a default by the respondent.

After argument was concluded, the judge received from the attorneys for the petitioner four of Russell's books.⁴⁶ The reception of

43. 173 Misc. 943, 944, 18 N. Y. S. (2d) 821, 823 (1940). One of the papers used later in the litigation, is an affidavit made by the Assistant Corporation Counsel in charge, Mr. Bucci, deposing that he did not indicate to Judge McGeehan that no answer would be made for the respondent, Board of Higher Education. No one acquainted with Mr. Bucci or the Honorable William Chanler, the Corporation Counsel, his superior, can doubt the good faith of these gentlemen. Judge McGeehan's good faith is likewise above reproach. A misunderstanding was of course possible. Assuming some misunderstanding on the matter, Professor Hamilton should have brought this to light rather than asserting that "without further ado the judge held trial and gave judgment."

44. Hamilton, *supra* note 1, at 779.

45. *Malossi v. McElligott*, 166 Misc. 513, 2 N. Y. S. (2d) 712 (Sup. Ct. 1936).

46. RUSSELL, EDUCATION AND THE GOOD LIFE; RUSSELL, EDUCATION AND THE MODERN WORLD; RUSSELL, WHAT I BELIEVE; RUSSELL, MARRIAGE AND MORALS.

these books was perfectly proper. Section 1288 of the Civil Practice Act provides "that the application may be accompanied by affidavits *and other written proofs*." The court therefore received these other papers in accordance with the law requiring them to be read on a contest of the sufficiency of the petition as they were "*other written proofs*." Furthermore, Section 1297 of the Act provides: "The court, upon respondent's default . . . may render a final order in favor of the petitioner on the basis of the petition *and accompanying papers*." Thus, these same books were needed as a basis for the final order which the court could make upon the respondent's default, if it denied the motion to dismiss. Each one of the books was referred to in the petition or in the amended matter and the Corporation Counsel at no time made any objection to the reception of any of the books in support of the petition on any ground. Thereafter the petitioner herself was called to the bar, sworn and identified. An opportunity to question her was offered to the Corporation Counsel but he asked no questions.

Summarizing these steps:

(1) An amendment to the petition was permitted without objection by the attorney for the respondent in accordance with Civil Practice Act, Section 1294.

(2) The judge reserved decision on the motion to dismiss.

(3) It was noted that, if the decision on the motion to dismiss was a denial of the motion, the respondent was willing to be in the position of a party "in default." An opportunity to secure time to answer had been offered to the respondent in accordance with Civil Practice Act, Section 1293.

(4) Certain books were received by the judge, without objection by the Corporation Counsel, to be read with the petition under Civil Practice Act, Section 1288 on the question of its sufficiency and under Civil Practice Act, Section 1297 in determining the nature of the final order should the motion to dismiss be denied.

(5) A final order was properly issued under Section 1295, as there had been "a default."⁴⁷

47. Hamilton, at page 778, note 4, seems to claim that at Special Term, Judge McGeehan could only hear the motion to dismiss the application of the petition and that Rule I of the N. Y. Supreme Court, First Judicial District, prevented his giving a final order. Rule I has no application to a proceeding under Article 78 because that Article makes specific provision for the procedure to be adopted in connection with applications under it. Rules inconsistent with directions of the Civil Practice Act must yield. *Liebman v. Van Denberg*, 168 Misc. 155, 6 N. Y. S. (2d) 428 (1938).

VI

Pertinent to this discussion, although not mentioned by Professor Hamilton, is the question whether the judge's action in making findings of fact was unusual. In answer, it should be noted that no principle of law prevents a judge setting down in writing the findings of fact and conclusions of law which result from his consideration of a case. At times, it is unnecessary.⁴⁸ Usually where default has been made by the respondent, judges do not take the trouble to compile carefully the facts upon which they administer their decisions. However, it must be remembered that the granting of an order under Article 78 is largely discretionary. For an appellate court to pass upon the question of whether discretion was properly exercised, it would have to be well informed concerning the basis upon which the original judge worked. Therefore, findings of fact would be very valuable on appeal. The practice under Article 78 is new and it seems that the procedure of the Judge in such a field was extremely cautious and commendable. Clearly indicating the basis upon which his order was issued protects the respondent before an appellate court.

VII

Vitriolic is the word for Dr. Hamilton's utterances. No such charges of bad faith were made by or against any of the government officials, members of the Board of Higher Education, professors on the staff of City College or the justice or lawyers involved in the case until an academician stepped in. It was recognized by the interested parties that although they conceived each other's positions to be mistaken, those positions were conscientiously assumed. It remained for a dilettante to hurl a gibe. But accusations based on skin-deep analysis accomplish nothing. Like Russell's pseudo-liberal philosophy, they render only disservice to the cause of true liberty to which many of us are attached.

48. See *Tyler v. Jahn*, 109 Misc. 425, 178 N. Y. S. 689 (Sup. Ct. 1919).

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CONTRIBUTORS TO THIS ISSUE

ALBERT KOCOUREK, 1895-1896, Lake Forest College; LL.B., 1897, Michigan University, School of Law. Professor of Law, Northwestern University, School of Law, 1914 to date. Author of *JURAL RELATIONS* (1927); *INTRODUCTION TO THE SCIENCE OF LAW* (1930); "*Privilege*" and "*Immunity*" as Used in the *Property Restatement* (1939) 1 *LA. L. REV.* 255; and various articles in law reviews.

GARRARD GLENN, A.B., 1899, University of Georgia; LL.B., 1903, Columbia University, School of Law. Professor of Law, University of Virginia, School of Law, 1929 to date. Author of *THE ARMY AND THE LAW* (1918); *FRAUDULENT CONVEYANCES* (1931); *LIQUIDATION* (1935); *FRAUDULENT CONVEYANCES AND PREFERENCES* (rev'd ed. 1940); *CASES ON CREDITORS' RIGHTS* (1940); and numerous articles in legal periodicals. Member of the Council of The American Law Institute.

WALTER B. KENNEDY, A.B., 1906, A.M., 1912, Holy Cross College; LL.B., 1909, Harvard University, School of Law. Member of the New York, Massachusetts and District of Columbia Bars. Professor of Law, Fordham University, School of Law, 1923 to date. Author of *CASES ON PERSONAL PROPERTY* (1932); *Psychologism in the Law* (1940) 29 *Geo. L. J.* 139; *Garnishment of Intangible Debts in New York* (1926) 35 *YALE L. J.* 689; *Law and The Railroad Problem* (1923) 32 *YALE L. J.* 553; and other articles in law reviews and legal periodicals.

WILLIAM R. WHITE, JR., A.B., 1930, Fordham College; LL.B., 1933, Fordham University, School of Law; A.M., 1938, Fordham University. Member of the New York Bar. Lecturer in Law, Fordham University, School of Law, 1936 to date. Contributor to *LeBuffe and Hayes, JURISPRUDENCE* (3d ed. rev. 1938); *PATON, DIGEST OF BANKING LAW* (1941); and various law reviews and legal periodicals.

FRANCIS X. CONWAY, A.B., 1930, Holy Cross College; LL.B., 1933, Fordham University, School of Law. Lecturer in Law, Fordham University, School of Law, 1938 to date. Member of the New York Bar.

JOSEPH B. LYNCH, A.B., 1913, Fordham College; LL.B., 1916, Fordham University, School of Law. Member of the New York Bar. Author of *Losses Resulting from Stock Becoming Worthless—Deductibility Under Federal Income Tax Laws* (1939) 8 FORDHAM L. REV. 199.

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